***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

CASE NO. 76-4234

NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

JC JO MANAGEMENT CORP.
d/b/a GLORIA'S MANOR HOME FOR ADULTS

Respondent

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CROSS PETITION

FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
JO JO MANAGEMENT CORP.

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## AUTHORITIES CITED

## STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the company violated Section 8(a)(1) of the Act by interrogating O'Toole about his rival union activities, giving the impression of surveillance and threatening employees O'Toole and Cleary with reprisals if they continued their activities on behalf of Local 1115 or voted against the incumbent union in the deauthorization election.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the company violated Section 8(a) (2) and (1) of the Act 1) when its bookkeeper withheld union dues from the pay of employees who had not signed checkoff authorizations, 2) when its bookkeeper solicited employees' signatures on dual purpose membership-checkoff cards and 3) when its cook and principal administrator made comments to one of the employees concerning the signing of certain papers requested by the incumbent union.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the company violated Section 8(a)(3), (4) and (1) of the Act by discharging employee Donald O'Toole because of his rival union activities and his participation in filing a deauthorization petition with the Board.

4. Whether substantial evidence on the record as a whole supports the Board's finding that the company had reasonable grounds to believe that the union demand for the discharge of

employees Gruenke, Sullivan, Clearly, Abernathy and Curry were for reasons other than the failure to pay the required dues and initiation fees which were not uniformly required of other employees.

## COUNTER STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board (hereinafter, the Board) pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of its Order and by the cross petition for review of the Board's Order by Jo-Jo Management Corporation, d/b/a Gloria's Manor Home for Adults (hereinafter referred to as Gloria's Manor) pursuant to Section 10(f) of the National Labor Relations Act, as amended.

## STATEMENT OF THE FACTS

In March of 1974, Medical Health Employees Union Local 4, Office and Professional Employees International Union, AFL-CIO, (hereinafter referred to as Local 4) commenced an organizational drive of the employees of Gloria's Manor, a newly opened home for senior citizens. The drive culminated in employer recognition of Local 4 as the bargaining representative of the employees. (A. 142). A collective bargaining agreement was executed on May 1, 1974. It contained a union security clause requiring all employees to become members of Local 4 after 30 days of employment. Donald O'Toole was elected as shop steward

In July of 1974, Local 1115 began its own organizational

drive of the employees of Gloria's Manor, despite the existent three-year collective bargaining agreement between Local 4 and the employer. To that end, a meeting was held with the employees at Roger's Restaurant, a neighboring eatery (A. 160). As a result of that meeting and Local 1115's efforts, a recognition petition was filed on July 30, 1974 with the National Labor Relations Board. Joseph Hagler, the chief administrator of Gloria's Manor, was informed of Local 1115's efforts by three of its employees who now supported that union: Davis, Donnegan and Donald O'Toole (A. 561). Because of the existent collective bargaining agreement that petition was rejected.

Although Joseph Hagler expressed no preference for one union as opposed to the other as testified to by certain of his employees (A. 265), he did express concern when the employees called a meeting on work time in the home's dining room thereby delaying the serving of breakfast. He voiced that concern by telling Donald O'Toole to spend more time tending to his responsibilities as a night watchman.

After the recognition petition failed, O'Toole co-sponsored a U.D. petition which was filed in September 1974 (A. 178). During the course of O'Toole's employment at Gloria's Manor as a night switchboard operator, he failed to follow instructions on numerous occasions, was negligent in the performance of his duties and was unavailable on a variety of occasions when the residents were in need of emergency care (A. 618-623). These actions culminated in his discharge on September 16, 1974

when Joseph Hagler discovered him in the kitchen preparing a meal at 1:30 a.m. instead of tending to the switchboard (A. 623). His lack of concern for the sometimes critical need of the Home's residents necessitated his termination.

As a result of the U.D. petition, an election was held in October 1974, which resulted in an unfavorable decision to Local 1115. Despite this fact, that Local held another meeting with the employees at Roger's Restaurant in November 1974 at which time additional authorization cards were passed around and signed (A. 328). Later that month, Vincent Gulino, the new president of Local 4, arrived at Gloria's Manor for a meeting with the employees. In response to their demands for better benefits, he promised to confront Joseph Hagler and ask the latter to renegotiate certain portions of the collective bargaining agreement (A. 286). Gulino returned again in December to receive a list of the employees demands for increased benefits.

Gulino also promised the employees that he would honor the initiation fee plan put into effect at the time of the execution of the collective bargaining agreement by Bob Gordon, the deceased Local 4 president. This plan provided that although all employees were required to pay dues, those employees who were part of Local 4's spring organizational drive would have their initiation fee waived. By contrast those employees who were hired after the execution of the agreement during the first year of the company's operation would have their initiation fees only deferred until the following spring. This was done

to protect the workers in case the "new Home" did not survive the first year's operation. However, it was made abundantly clear to the employees by both Vincent Gulino and Henry Finneguerra, Local 4 representatives, that although the fees had to be paid, arrangements could be worked out to pay them that would not economically harm the workers (A. 472-496).*

Despite the liberality in the payment of the initiation fees and dues, six employees failed to either sign a dues checkoff, make their required dues payment or state their intentions concerning the initiation fees. Abernathy, Curry, Sullivan, Cleary, Gruenke and LaPaz were the six employees. In January 1975, Gulino returned to Gloria's Manor to talk to the six and reminded them of their obligations (A. 710-715). They responded that they wanted nothing further to do with Local 4 and that moreover the dues had already been deducted by the employer. Gulino then advised that he did not receive the money and that such deduction without a checkoff authorization was illegal. He gave the employees until mid-February to pay their dues. As he was leaving Curry told him "get out of here, I don't want to see you, I'm not paying any dues".

As a result of Gulino's notice to the employer of the impropriety of collecting dues without an authorization and employer verification through their attorney, Joseph Hagler

* Despite the General Counsel argument that the dues and fees were not uniformly required, the above explanation makes it clear that the five dischargees, as post collective bargaining agreement employees, were treated the same as others who were hired after the date of that agreement. Henry Finneguerra in March 1975 demanded only that these employees state their intentions concerning the initiation fees whose payment would have to be made commencing within the next few months.

returned the dues collected from these six employees on February 24, 1975 (A. 710). Approximately four days later, Henry Finneguerra of Local 4 came to Gloria's Manor to remind the six employees still another time that because of the illegal deduction, the union did not receive their dues (A. 727-728). He requested that they sign the checkoff authorization, pay the dues or work out a method of payment. In response he was told by Gruenke that she would not pay the dues and by Cleary that he wanted no part of Local 4. Finneguerra then, faced with no choice in the matter, demanded of Joseph Hagler that the six employees be discharged. Hagler refused and demanded that the union's request be put in writing. In the interim, Hagler advised his employees that he liked their work, didn't want to lose them and pled with them to straighten out their obligations to Local 4 (A. 695).

On March 3, 1975 Henry Finneguerra returned to Gloria's Manor armed with his written request. However, he once again spoke with the six employees and asked them to pay their dues and state their intention concerning the initiation fee (A. 695). When the employees refused, Finneguerra demanded their discharge pursuant to the union security clause in the collective bargaining agreement. Faced with no alternative, in light of the written request and verification from his attorney that he had to honor it and despite his renewed pleas to the employees on March 3, Hagler discharged the said six employees.

It was as a result of Hagler's discharge of these

employees as well as his termination of Donald O'Toole which formed the nucleus of General Counsel's allegations of violations of the National Labor Relations Act.

## LEGAL ARGUMENT

### POINT I

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING O'TOOLE ABOUT HIS RIVAL UNION ACTIVITIES, GIVING THE IMPRESSION OF SURVEILLANCE AND THREATENING EMPLOYEES O'TOOLE AND CLEARY WITH REPRISALS IF THEY CONTINUED THEIR ACTIVITIES ON BEHALF OF LOCAL 1115 OR VOTED AGAINST THE INCUMBENT UNION IN THE DEAUTHORIZATION ELECTION.

The Board held that the company violated Section 8(a)(1) of the Act as a result of three comments purportedly made by Joseph Hagler. These consisted of: 1) an alleged interrogation and implication of surveillance made to Donald O'Toole in mid-July, 2) a threat to O'Toole made in late July, and 3) a threat to employee Cleary on October 11, 1974. As admitted by the Administrative Law Judge, the sole evidence introduced to support these comments was the testimony of the two recipients (O'Toole and Cleary). Each only testified as to the instance in which he was involved. The result is that the four 8(a)(1) violations were based on the single self serving totally uncorroborated statements of two witnesses. Discrepancies in their individual testimony and denials by Hagler and in some instances by other General Counsel and respondent's witnesses were found insufficient to preclude the Board's adoption of the Administrative Law Judge's findings.

However, it is well settled that the Court of Appeals may decline to follow the action of the A.L.J. in crediting and discrediting testimony even though the Board may have accepted the Judge's findings. In point of fact, the Court is not barred from setting aside the Board's decision if it cannot conscienciously find that the evidence supporting it is substantial.

N.L.R.B. vs. MONROE AUTOMOBILE EQUIPMENT CO. 392 F2d 559 (C.A. 5, 1968); PORTABLE ELECTRIC TOOLS INC. VS. N.L.R.B. 309 F2d 423 (C.A. 7, 1962). More importantly, in deciding whether the evidence supporting it is substantial, that evidence must be viewed "in the light that the record in its entirety furnishes including the body of evidence opposed to the Board's review." UNIVERSAL CAMERA CORP. VS. N.L.R.B. 340 U.S. 474 (1950). Thus the damaging evidence cannot be viewed in a vaccuum and, as stated by Justice Frankfurter, "must do more than create mere suspicion". When the limited evidence of General Counsel is viewed in this manner, it becomes clear that the company is not guilty of any 8(a)(1) violations.

The Surveillance and Threats - According to O'Toole, following the employees meeting with a Local 1115 representative in mid-July, Hagler called him into his office. O'Toole quoted Hagler as saying that "he had given $5.00 to someone who was at the meeting and that they had given him the names of everybody who was at the meeting and that's how he found out who was there". (A. 166-167). O'Toole also quoted Hagler as telling him in a second confrontation in late July that "he knew a lot of people and could see to it that he (O'Toole) was fired because of his activities on behalf of Local 1115 (A. 171). Finally Cleary testified that on October 11, 1974, Hagler told him that if he liked his job he would know how to vote (A. 427).

Hagler categorically denied each of the three comments set forth above. He stated that he only spoke specifically with

O'Toole on one occasion. This occurred in mid-July after he had found out that the patients breakfast was being delayed because of a meeting called and conducted by O'Toole. He warned O'Toole that although he was off-duty, the other employees were not and that he should not interfere with their performing their duties. He told O'Toole that he would be better off concentrating more on his own work than holding up operations.*

Hagler denied possessing a list of employees who attended the Local 1115 meeting or giving the impression to O'Toole that he possessed such a list (A. 701). Moreover, he denied threatening to discharge O'Toole for any Local 1115 activity. (A. 700). Unlike O'Toole's and Cleary's testimony which was self serving and uncorroborated, Hagler's testimony that he had no 1115 animus and thus had no reason to conduct surveillance or make threats finds supports in the record. Employees Curry, Abernathy and Cleary, General Counsel witnesses, readily admitted that Hagler told them when they were hired that he had no preference for either union and that the employees were free to select whomever they preferred (A. 423). Thus, these witnesses, who had no reasons to give statements favorable to the company, totally contradicted the employer animus to Local 1115 suggested by O'Toole and Cleary. Since these three General Counsel witnesses attested to Hagler's impartiality, it becomes difficult to believe

* Although the A.L.J. took exception to this rebuke by Hagler since O'Toole was off-duty, respondent asserts that his conduct was totally justified since O'Toole was spending his off-duty time preventing the other employees from attending to their duties.

O'Toole and Cleary's accusations of threats and surveillance.

In addition to the above, the evidence also clearly reflects that Hagler did not need surveillance to know of Local 1115's activities and O'Toole's involvement. Initially, it must be noted that employees Davis, Donnegan and O'Toole all told Hagler voluntarily in July that they supported Local 1115 (A. 561). Moreover, later Hagler received formal notification of Local 1115's petition for recognition. Indeed, it was as a result of this notification that Hagler called a meeting of all employees (not just O'Toole) and asked them to advise him what was happening in light of the collective bargaining agreement with Local 4. (A. 167). Thus, any questioning by Hagler is more likely to have occurred after this notice than in mid-July as suggested by O'Toole.

The demands by Hagler, his recollection of the events and the testimony of General Counsel witnesses supporting him are not the only proofs available to discredit O'Toole and Cleary's comments. O'Toole's testimony itself is filled with inconsistencies, contradictions and rebuttals by other witnesses. Although such contradictions pertain to other aspects of his testimony, their presence casts doubts on the credibility of his entire dissitation.

For example, O'Toole testified that at the time he was fired, Hagler showed him the U.D. petition sponsored by him. This was clearly a lie as counsel for General Counsel acknowledged that such petitions were not sent to the employer by the Board nor were the names of the three people who sponsored it supplied to the employer (A. 169). Secondly, O'Toole maintained that he

had no responsibility or duty to bring the chairs into the premises in the evening. Yet this statement is disputed by employee, Mary Duffy and resident, Westheimer who related that it was always O'Toole's duty to bring the chairs in. Finally his testimony that he was the only shop steward for Local 4 and that the post was not an elected one was contradicted by employees Abernathy and Curry. Both stated that the post was an elected one and that employees Evelyn O'Conner and Curry were elected to the post at various times (A. 276 and 364).

Clearly then, viewing the evidence in its entirety including the body of proofs contrary to the Board's decision as required in UNIVERSAL CAMERA CORP. it is obvious that substantial credible evidence does not support the Board's finding of an 8(a)(1) violation given the denials, support for Hagler's position and the inconsistencies and contradictions found throughout O'Toole's self surving testimony.

The Interrogation - O'Toole also testified that during the aforementioned mid-July meeting he had with Hagler, the latter questioned him as to why the employees were not satisfied with Local 4 and why they were turning to Local 1115 (A. 68). Hagler specifically denied that any such meeting occurred in his office at any time and that such questions were asked.(A. 700). Rather he mentioned that he had no knowledge of Local 1115 involvement until later that month. When he did discover that Local 1115 was in the picture, he called a meeting of his employees in late July and asked them what was happening.

Respondent asserts that O'Toole's testimony in this regard should not be credited in light of the inconsistencies and contraditions discussed above. Any conclusion of an 8(a)(1) violation based on O'Toole's accusations of interrogation was simply not based on substantial credible evidence.

Nevertheless, even if O'Toole's testimony is credited in this regard, respondent contends that neither the questions alluded to by O'Toole nor those testified to by Hagler constitute 8(a)(1) violations. It is well settled that mere interrogation of employees concerning union membership is not per se a violation of the National Labor Relations Act. N.L.R.B. VS. TOWNHOUSE TV AND APPLIANCES, INC. 531 F2d 826 (C.A. 7, 1976). As was said by the tenth circuit in N.L.R.B. VS. PASCHALL TRUCKLINES INC. 469 F2d 74 (1972):

> "Interrogation of employees is not per se unlawful; to be unlawful, it must be coercive and interfere with or restrain the employees and the burden of proof rests upon General Counsel to prove that the interrogation violated the Act."

See also N.L.R.B. VS. SACHS, 503 F2d 1229 (C.A. 7, 1974) where it was held that interrogation, not coercive in itself, does not become coercive because an employer is guilty of another unfair labor practice.

It is hard to see how such questions as "why are you not satisfied with Local 4, why are you turning to Local 1115 and what is happening" can be deemed coercive in view of Hagler's statements of impartiality testified to by Curry and Abernathy. Indeed such questions are quite reasonable and

understandable in view of the fact that the employees had just executed a collective bargaining agreement with Local 4 only two months earlier. One would think that the employees would have been expecting the questions rather than being intimidated by it. In essence, the employees were seeking to cancel out the remaining 34 of the 36 month agreement in favor of another union which had caught its fancy. They had hardly given Local 4 a chance to perform. Under these circumstances and absent proof of any Hagler involvement in bringing Local 4 in, the employer, in the interest of his newly opened Home had a right as an interested third party to know why the sudden shift in preference. One must distinguish between an innocuous and understandable inquiry and an interrogation. Hagler's questioning, whether as recalled by O'Toole or Hagler himself, more properly falls into the former category and accordingly must not be considered an 8(a)(1) violation.

## POINT II

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTIONS 8(a)(2) and (1) OF THE ACT WHEN ITS BOOKKEEPER WITHHELD UNION DUES FROM THE PAY OF EMPLOYEES WHO HAD NOT SIGNED CHECKOFF AUTHORIZATIONS, AND 2) WHEN ITS BOOKKEEPER SOLICITED EMPLOYEES' SIGNATURES ON DUAL PURPOSE MEMBERSHIP-CHECKOFF CARDS AND 3) WHEN ITS COOK AND PRINCIPAL ADMINISTRATOR MADE COMMENTS TO ONE OF THE EMPLOYEES CONCERNING THE SIGNING OF CERTAIN PAPERS REQUESTED BY THE INCUMBENT UNION.

The Board's findings of 8(a)(2) violations were based on four specific instances of alleged misconduct. Three of these instances did not even involve Hagler. The withholding of union dues by the bookkeeper from employees who did not sign checkoff cards, the bookkeeper's solicitation of employee signature cards and the cook's statement to Cleary were all found violative of the Act along with Hagler's request that Cleary "sign for the union". All four instances have one fact in common. They were all motivated by the mistaken belief that employees were required to become members of Local 4 in order to avoid discharge under the union security clause of the existing collective Bargaining agreement.

To be sure, it has been legally resolved that the employees need only pay their dues and fees directly to the union to satisfy their membership requirement under the Act. They need not sign membership cards or dues checkoff cards. N.L.R.B. VS. GENERAL MOTORS CORP. 373 U.S. 734 (1963). However, common knowledge of this interpretation of the membership requirement does not exist. Moreover, to expect an employer or those alleged to be his agent to have this knowledge is unreasonable in light

of the legal complexities involved. The Second Circuit Court of Appeals specifically held in N.L.R.B. VS. ZOE CHEMICAL CORP. 406 F2d 574 (C.A. 2, 1969):

> "We do not think that an employer can fairly be held at his peril correctly to interpret the legality of a requirement such as signing membership cards..."

Accordingly, even if issues of fact, of whether the agent's act is attributable to Hagler, and of whether such acts constitute unlawful assistance are resolved against the employer, the instances described above still cannot be found violative of the Act. Since the employer cannot be penalized for incorrectly interpreting the "membership" requirement of the Act, his efforts in deducting dues and requesting signatures can only be viewed as innocuous and excusable acts performed solely to help the employees comply with what was believed to be their legal requirements under the act.

Nevertheless, even if the aforementioned reasoning is not followed by the court, the substantial evidence on the record and the applicable legal principals both demonstrate that 1) the proofs are not as the Board found them, 2) the acts of the bookkeeper and the cook are not attributable to Hagler and 3) such acts do not constitute unlawful assistence. Of course, a finding against the Board on any one of these issues (rather than all three) is sufficient to preclude a finding of any 8(a)(2) violation.

The record shows that the bookkeeper did in fact deduct dues from certain employees despite the fact that they had not

signed dues checkoff cards. It is also uncontroverted that she offered membership cards to certain employees and asked that they sign it. However no where is it contended that the latter act was done at the direction or instigation of Hagler. In addition thereto, although the bookkeeper stated that she was instructed to make the dues deduction by Hagler, the administrator vehemently denied this (A. 598). He stated that he gave no instructions whatsoever to the bookkeeper concerning any dues and fee deductions. (A. 608). Moreover, he advised that if her actions were based on instruction, that they probably came from Local 4 (A. 610). This fact is born out by the testimony of Vincent Gulino who advised that at that time he did give instructions to the bookkeeper concerning dues, fees and membership cards (A. 608). In any event, the evidence on this subject is conflicting and clearly not the type of substantial credible evidence present in the record as a whole necessary for an adverse finding under the principles laid down in the UNIVERSAL CAMERA case.

What the substantial credible evidence does reflect then is only two acts by the bookkeeper performed because of her own belief that the employees were required to sign cards and pay dues as a condition of employment if they were to remain on the job. Indeed it is obvious that her actions were not caused by any zestful desire to throw support to Local 4, but rather by a desire to simply fulfill her clerical duties. Under these circumstances, it is well settled that such conduct cannot be attributed to the employer. It was clearly resolved in N.L.R.B.

VS. DAYTON MOTELS INC. 474 F2d 328 (C.A. 6, 1973) that the actions of a nonsupervisory employee cannot be attributed to the employer under any principles of agency unless management instigated, directed, requested or acquiesed in the conduct. See also N.L.R.B. VS. SAYERS PRINTING COMPANY 453 F2d 810 (C.A. 8, 1971). Thus since there is no proof that Hagler directed the bookkeeper to request card signatures and less than substantial evidence that he directed the dues deductions, her actions cannot be attributed to the company.

Nevertheless, even if they were attributable to him, it is equally clear as a matter of law that such acts do not constitute unlawful assistance in violation of Section 8(a)(2) of the Act. 29 U.S.C.A. 158(a)(2) provides in part:

> "It is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

The critical consideration is what constitutes "support". In defining support, the courts have made it quite clear that there is a definite line between cooperation and support. Cooperation extended to a recognized union which is functioning under a valid collective bargaining agreement is far differenct from assistance given to an organizing union which is attempting to gain support from a majority of the employees in order to request recognition from a company.

This important distinction was discussed in some detail in CONTINENTAL DISTILLING SALES CO. VS. N.L.R.B. 348 F2d 246 (C.A. 7, 1965). There, a newly organized company extended certain

amenities to a union which was trying to obtain support from employees as the latter was being hired by the company prior to its opening. The court said:

> "Continental was in some respects cooperative, but assistance and cooperation do not spell coercion or interference.".

In quoting from N.L.R.B. VS. POST PUBLISHING COMPANY 311 F2d 565 (C.A. 7, 1960), the court said:

> "We conclude that the Board erred in failing to properly distinguish between "support and cooperation". The course of conduct engaged in by the respondent in its relationship with (the union) follows that pattern of friendly and courteous cooperation or even generous action of the sort we feel brings about the end result in labor-management relations sought by the underlying philosophy motivating the N.L.R.A."

Clearly the bookkeeper's actions in deducting dues and requesting employees to sign cards under the facts of the case at bar falls within the area of cooperation. It must be remembered that this was not a situation where two unions were competing for employee's support and employer recognition. Local 4 had received recognition, executed a valid collective bargaining agreement and even withstood two U.D. petitions and one U.D. election. Accordingly, it was firmly entrenched as the representative of the employees of Gloria's Manor. Accordingly there was no support that Local 4 needed from the bookkeeper. Her actions can more properly be described as an attempt to cooperate with and get along with "this new entity" which would be a permanent part of Gloria's Manor operations for the next two and a half years. As was said in CONTINENTAL:

"At least in the absence of excessive assistance to a known party, one cannot discriminate against someone not known to exist."

Accordingly, given the fact that Local 4 was already established as the bargaining representative, the bookkeeper's mistaken belief that dues deductions and card signatures were required, and the fact that her inquiries for card signatures were merely requests and not demands intended to coerce, it is clear her actions fell within the realm of cooperation extended to the existing bargaining representative as opposed to the type of support intended to preclude employees from exercising their Section 7 rights. Indeed, the conduct of the five dischargees demonstrates that the bookkeeper's actions in no way precluded them from exercising their rights.

The same three issues considered in connection with the bookkeeper's action must be considered in connection with the comments directed at employee Cleary in order to determine if any 8(a)(2) violation occurred in those two instances. Factually, there must be substantial credible evidence that the cook was a supervisor within the meaning with the act. Moreover, it must be shown that the cook's comment was attributable to Hagler. Finally, it must be established that the cook's comment and Hagler's comment to Cleary constituted unlawful assistance to Local 4.

General Counsel in its brief asserted that a cook supervisor (p. 35) told Cleary in February that he was about to face a choice between his job and signing a dues checkoff card.

The evidence adduced to prove that the cook was such a supervisor was non existent. 29 U.S.C.A. 152 (11) defines supervisor as:

> "any individual having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to direct them or to adjust their greivances or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

There was absolutely no evidence offered on the subject of the cook's duties, responsibilities, powers or the manner in which he was regarded by the employees. Clearly then, substantial credible evidence on the record as a whole does not exist to support the contention that the cook was a supervisor. Accordingly since there is no proof that Hagler instigated the cook to make that comment, the cook's comment cannot be attributed to the company.

Nevertheless even if the cook is found to be a supervisor, his comments cannot be attributed to Hagler unless Cleary would have just cause to believe that the cook was acting for and on behalf of the company when he offered the comment. N.L.R.B. VS. PATENTS TRADER INC. 415 F2d 190 (C.A.2, 1969). Since the record is void of any favoritism toward Local 4 by Hagler or animosity toward Local 1115, it is hard to conclude that Cleary believed the cook was acting for Hagler when he made the statement. There is no proof that such a belief was maintained or even justified. This is especially so in light of Hagler's repeated pleas to the employees and Cleary in particular that he did not

want to lose them. Hagler's conduct in February clearly suggests that the last thing he wanted to do was to put them in a position where they had to leave.

Finally, it is hard to conclude that such a comment constitutes unlawful support to Local 4. It was clearly not made as a demand by the cook for Cleary to choose. The statement had no threats or coercion attached to it. It was merely the statement of an outsider assessing the situation to Cleary as he saw it based on the alleged union's demand. It was strictly an opinion and as such was neither an unlawful assistance or even attributable to the employer. See LAKE CITY FOUNDRY CO. VS. N.L.R.B. 432 F2d 1162 (C.A. 7, 1970) where the Court held that no unfair labor practice existed when the president's secretary told an employee he should consider his family because if the union came in, there might be less work and since he was a new employee, he could be the first to be laid off.

Finally respondent asserts that Hagler's alleged comment to Cleary that he should have signed the paper and pay his dues also cannot be considered unlawful assistance in violation with Section 8(a)(2). This is so because Hagler's comment was in the form of an observation or belated request as opposed to a demand or threat. His goal was not to assist Local 4 in getting a new member but rather to keep from having to discharge a good employee. Moreover, the comment could not assist Local 4 because since they were the bargaining representative under the existing collective bargaining agreement, they had no real concern as to

whether Cleary paid his dues or joined the union. The evidence more properly demonstrates that the comment was made 1) to cooperate with Local 4 once the employer mistakenly believed that Cleary had to become a member and 2) to prevent the loss of a good employee. Clearly no assistance was intended, given or needed under the facts of the case at bar.

## POINT III

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3), (4) and (1) OF THE ACT BY DISCHARGING EMPLOYEE DONALD O'TOOLE BECAUSE OF HIS RIVAL UNION ACTIVITIES AND HIS PARTICIPATION IN FILING A DEAUTHORIZATION PETITION WITH THE BOARD.

The basis for the Board's finding that O'Toole's discharge violated Sections 8(a)(3) and (4) of the Act was strictly O'Toole's own testimony on direct examination. His recollection of the events of September 16, 1974 were quite one sided and solely dedicated to the incrimination of Hagler. There was little said as to the derilection of his duties prior to that date or of Hagler's reasons for the discharge expressed on that date. Only O'Toole's self serving hearsay testimony of what Hagler said was expressed.

According to O'Toole, at approximately 2:00 a.m. he was in the kitchen preparing a meal as he was permitted to do when Hagler walked in. He claimed that the employer screamed at him and ordered him into his office. Once there Hagler purportedly told him that O'Toole was not doing him any good, was costing him a bundle of legal fees and that Local 1115 was causing him trouble. He stated that Hagler pulled out of his safe a U.D. petition with O'Toole's name on it as a cosponsor and confronted the employee with it. O'Toole was then fired and told to return the following Thursday (A. 188).

This limited and biased testimony however only represents one side of the coin as to what happened on that date. The nature and extent of O'Toole's vast derilections of duties prior

thereto which really prompted the discharge were obviously never mentioned. However as was said in UNIVERSAL CAMERA CORP., the Court of Appeals must view the record a s a whole including the entire body of evidence opposed to the Board's view. And, that entire body of evidence demonstrating O'Toole's total disregard for his duties and the welfare of the residents at the Home was vast, varied and corroborated. It demonstrated clearly that O'Toole was not fired because of any union activity or sponsorship of the U.D. petition. Rather it details, through Hagler and statements of residents and other employees an infamous employment record filled with a total disregard for orders, specific responsibilities and concern for residents who varied in age between 70 and 90. This background need only be explored through the testimony of the various witnesses brought forth on the subject.

The first inkling that O'Toole may not have told the full story behind his discharge comes through in cross examination. There, he admitted that there was more to Hagler's comments on September 16 than the alleged complaints of O'Toole's involvement with Local 1115. O'Toole admitted that Hagler made a variety of comments in the kitchen and they all related to the fact that once again O'Toole left the switchboard unmanned and the residents safety unprotected while he pursued his own interests (A. 185-186, 192, 217-224). These were subject matters which were to be laid out more fully by the respondent in his defense. In addition, O'Toole admitted that while in Hagler's office on that day, he

was admonished by Hagler for not doing what he was paid to do and for leaving the chairs outside again (A. 192-194, 200, 225). Finally it was stipulated by counsel for General Counsel that the employer was never given the U.D. petition itself or the names of the co-sponsors (A. 237). Accordingly, O'Toole's direct testimony intending to show that his authorization of the U.D. petition caused his firing was nothing more than a fabrication or distortion of the truth. In reality then, further inquiry of O'Toole revealed that Hagler's concern on that date 1) was not as tied up with O'Toole's activities on behalf of Local 1115 as the employee would like us to believe, and 2) there remained a whole area of proof to be explored concerning O'Toole's track record on the job which was of more concern to Hagler and which ultimately resulted in his discharge.

Hagler himself related O'Toole's background on the job which accounted for his discharge. When O'Toole was first hired, Hagler instructed both O'Toole and employee Romayne (the night switchboard operation who alternated with O'Toole) as to their duties (A. 613-615, 620). They were to 1) constantly man the switchboard for emergencies, 2) secure the building, 3) bring in the porch chairs, and 4) make the rounds of the floors every two hours and punch the appropriate clocks (A process which took 5 to 10 minutes according to O'Toole). The men were to come in one half hour early at 10:00 p.m. to receive any additional instructions left for them with Mary Duffy, an office worker, by Hagler. During this period, they were to bring in

the chairs, lock the gates and if they wished, prepare a meal in the kitchen to be eaten later by them at the switchboard. They were paid on an hourly rate right through the night with no lunch break which accounted for their preparation of food prior to their shift. Hagler then went on to describe the importance of manning the switchboard constantly. The facility was required by law to have a phone tie-up between each resident's room and the switchboard so that the residents could receive the emergency care which often became necessary because of their age and condition.

Despite this clear enunciation of his duties and the importance to the residents of a manned switchboard, O'Toole constantly broke the rules. This fact was attested to not only by Hagler, but by various residents and employees who were on the premises and observed O'Toole's conduct. By his own admission, on one occasion O'Toole, realizing he would be late for work, asked another employee to punch in for him (A. 622). This situation left the switchboard unmanned and raised speculation that he may have left the switchboard unmanned on other occasions while he had someone else punch in for him. In a separate area of deriliction, O'Toole was warned repeatedly that he was to bring in all the chairs each evening. Despite the warnings, O'Toole continued to leave the chairs outside until finally one morning some of the chairs were stolen (A. 618). O'Toole's dereliction in this regard was also testified to by resident Sidney Silver (A. 667).

The major cause of concern to Hagler (of much greater importance than any union activities of O'Toole) were the repeated complaints of the residents that they were unable to get through to the switchboard during emergencies. One resident complaint to Hagler that she almost died the previous night because of her inability to get through (A. 619). Despite repeated warnings to O'Toole by Hagler, his dangerous dereliction in this regard continued.

More importantly, not only did his failure to properly man the switchboard increase the exposure to danger, but emergencies actually occurred during times when O'Toole was on duty and yet no where to be found. Resident Dora Feiffer told Hagler that she required an ambulance one night and could not get through to the switchboard though she tried 10 or 12 times (A. 664). Sidney Silver, a resident who used a pacemaker, told Hagler he had trouble breathing one night and couldn't get through although he tried all night (A. 665). Mary Duffy also testified that on one occasion the residents complained to her about not being able to get through to the switchboard (A. 677). Martin Weistheimer another resident testified that on one occasion he was quite ill and couldn't get through to the switchboard (A. 685).

Perhaps the best illustration of the lack of concern O'Toole had for his job and the residents was testified to by Martin Weistheimer. Mr. Weistheimer, although a resident, was quite active in the affairs of the facility and often volunteered

to help with the residents and the Home when needed. He stated that on many nights O'Toole left the switchboard unmanned and sat in the rear of the lobby watching TV (A. 683-684). On one occasion he came down in the morning only to find the switchboard unmanned, andonce again, O'Toole no where to be found (A. 625).

The picture thus presented not only by Hagler, but by his residents and employees is a grim one. It demonstrates that O'Toole's course of conduct was one of irresponsibility which one day might have lead to tragedy. It was under these circumstances following these incidents that Hagler began screaming at O'Toole when he discovered him in the kitchen at 2:00 a.m. in the morning preparing himself a meal. After being told of O'Toole's derelictions and warning him about them, Hagler finally saw first hand the proof of O'Toole's intentional conduct not to man the switchboard (A. 620-623). Counsel for General Counsel attaches much significance to the fact that O'Toole's discharge occurred less than a week after he helped file the U.D. petition. This fact was of little significance to Hagler, however. It was of much more concern to the owner that O'Toole's conduct on September 16, 1974 followed on the heels of numerous complaints and a three month history of derelictions of duties. Counsel's contention that the discharge was motivated by O'Toole's union activities seems little more than a coincidence and idle speculation in the light of the vast dangers which O'Toole constantly left Hagler and the residents exposed to. Indeed, if one discredits the testimony of

O'Toole, there is little proof left to even draw an inference that Hagler's attitude toward Local 1115 was one of hostility as opposed to neutrality. The cause of the discharge was not O'Toole's activities on behalf of Local 1115 as only he testified to, but rather the substantial background of rulebreaking, dereliction of duties and the unmanned switchboard, as set forth in the detailed, consistent and corroborative evidence which constitutes the bulk of the record on the issue.

Given a review of the record as a whole including the vast body of evidence in opposition to General Counsel as set forth above, it is clear that substantial evidence does not exist to support the Board's finding of 8(a)(3) and (4) violations.

## POINT IV

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE EMPLOYER HAD REASONABLE GROUNDS TO BELIEVE THAT THE UNION DEMANDED THE DISCHARGE OF EMPLOYEES GRUENKE, SULLIVAN, CLEARY, ABERNATHY AND CURRY FOR REASONS OTHER THAN THE FAILURE TO PAY THE REQUIRED DUES AND INITIATION FEES. ACCORDINGLY, THE EMPLOYER DISCHARGE OF THESE FIVE EMPLOYEES DID NOT VIOLATE SECTIONS 8(a)(1) and (3) OF THE ACT.

It is well settled that an employer, at the union's request, is required to discharge an employee, who has failed to tender his periodic dues and initiation fees unless the former has reasonable grounds to believe that there was an unlawful motivation behind the union's demand which was the real reason for the failure to pay or accept payment and the request to discharge. N.L.R.B. vs. LEECE-NEVILLE COMPANY 330 F2d 242 (C.A. 6, 1964); N.L.R.B. VS. HERSHEY FOODS CORPORATION 513 F2d 1083 (C.A. 9, 1975). The critical problem for both the employer and the courts (in judging the employer's conduct) is to ascertain what the real cause for the failure to pay dues was.

Where the employees have failed to pay dues or the union has failed to accept same because of an illegal condition (such as the execution of dues check-off - membership cards) and the employer was aware of this sole obstacle, reasonable grounds is said to exist. N.L.R.B. VS. LOCAL 138 INTERNATIONAL UNION OF OPERATING ENGINEERS 293 F2d 187 (C.A. 2, 1961). Contrariwise, where the real reason for the failure to make payment and the demand for discharge were based on employee hostility and animosity to the union and a desire not to cooperate with the union under any circumstances, reasonable grounds does

not exist. N.L.R.B. VS. ZOE CHEMICAL COMPANY, INC. supra. The major problem develops however where both reasons present themselves within the same factual context (namely, an illegal demand is made by the union of employees who have already decided that they want nothing further to do with the union under any circumstances including paying dues lawfully required).

Under this situation, the court must inquire as to the employer knowledge of each reason as well as which reason the employer relied on. The important consideration, though, is that even if the real reason for non-payment was an unlawful union condition, the employer will still not be found at fault if reasonable grounds existed for him to conclude that non-payment was based on another reason such as employee hostility. Thus, in N.L.R.B. VS. PAPE BROADCASTING COMPANY supra, it was held that the employer was not guilty of an 8(a)(3) violation for discharging an employee at the union's request even though tender of dues was offered and rejected and the real reason for the request was the employees refusal to give up membership in another local. In essence, the court there concluded that it didn't matter if there was evidence to support the proposition that "reasonable grounds" existed so long as there was conflicting evidence which showed that the employer was justified in believing that "reasonable grounds" did not exist. In providing what limited guidelines there are on the subject, the ZOE court, quoting from the PAPE decision said:

"Reasonable grounds to believe may not be

> inferred from isolated facts, but on the contrary, must consist of all conflicting evidence available to the person sought to be charged with the belief, which furthermore must be sufficient for a reasonable man to form a belief upon evaluation thereof." Id at page 581

The thrust of the aforementioned cases, which constitute the foundation for the limited case law on the subject, is that you cannot simply point to the existence of an illegal union demand and employer knowledge thereof and conclude that therefore "reasonable grounds" for the employer existed. Rather, you must consider all the conflicting evidence available to the employer at the time including evidence that the employees would not tender dues under any circumstances - illegal union demand or not. Moreover, if conflicting evidence leads to the opposite conclusion and the employer relies on that evidence and conclusion, there will be no 8(a)(3) violation, even though an unlawful union demand existed, provided it was reasonable for the employer to rely thereon. It is the reasonableness of the employer's conclusion given all the facts of the case which determines whether his conduct was correct and not simply his awareness of the unlawful union prerequisite.

The respondent company contends that conflicting evidence of the type existent in PAPE and ZOE existed in the case at bar and was responsible for them reaching the conclusion that reasonable grounds did not exist for believing that the employees were discharged for unlawful union demands as opposed to the failure to pay periodic dues. The record was replete with comments from each of the five dischargees, as well

as from Hagler and Local 4 representatives as tc the extreme hostility and animosity which had been built toward Local 4. The employees, both expressly and impliedly let it be known that under no circumstances would they tender dues to that union or cooperate with them in any way. They were not about to pay dues to Local 4 under any circumstances whether payment was tied up with an unlawful union demand for dues, check-offs or not. That is why, unlike the ZOE and PAPE cases, the employees here never voluntarily tendered dues to Local 4 (once the unauthorized dues were returned to them) and never communicated to the employer that they were not paying because of the dues check-off requirement. They never communicated the unlawful demands of the employer because that demand was never a consideration in their decision not to pay dues to Local 4.

Rather than the ZOE decision being clearly distinguishable from the case at bar, as the Board contends, it is almost totally on point and applicable. It stands for the proposition that although facts such as an illegal union prerequisite and the communication thereof to the employer are relevant considerations, they are merely preliminary questions which are not necessarily dispositive of the real issue. The crucial questions which must be answered to properly resolve the issue are 1) whether the unlawful union prerequisite was the real reason for the failure to pay dues or only a mirage used by the employees to cloud the real reason (employee animosity) and 2) whether the employer was aware of the real reason and justified in relying thereon.

The facts of ZOE bear a strking similarity to the facts of the case sub judice. If any difference exists at all, it is in the fact that no doubt exists as to the unlawful conduct of the incumbent union there (Local 803) while a substantial credibility question exists in the present case concerning any unlawful conduct of Local 4. Although in both cases the written demand for discharge was couched solely in terms of failure to pay dues, there is no doubt that Local 803 conditioned continued employment on the execution of membership cards. The proof of such unlawful conduct of the incumbent union is not so readily available in the case at bar. To be sure, Local 4 representatives sought to have the five employees sign cards, but they vehemently denied conditioning employment on the execution of the cards. It is acknowledged that execution of the cards was a more favorable way for the union to get the employees to satisfy their obligations. However, Vincent Gulino and Henry Finneguerra made it clear that their primary goal was only to get the employees to make some decision as to the manner in which the dues would be paid. Clearly, the "reasonable grounds" prerequisite contained in the statute was more readily present in the ZOE decision than in the case at bar. Yet despite the clear presence of the unlawful demand there, the Second Circuit held that no reasonable grounds existed in light of the employees avowed position to have nothing to do with Local 803.

A second key similarity is the fact that the unlawful union demand was allegedly communicated to both employers. How-

ever, here too there is an interesting distinction which makes "employer reasonable grounds to believe" stronger in ZOE than in Gloria's Manor. In ZOE this fact was told to the employer directly by the employees who advised "we offered him the dues and according to law, we are suppose to offer them. But we don't have to join any union"..."we offered dues, can't we just pay our dues and still work here". Indeed this testimony was the basis for the Board decision against the employer.

In the case sub judice, there was no such employee communication to the employer. No employee advised Hagler that he would not pay dues because of an unlawful union demand for membership which was attached to the dues prerequisite. The Board contended that employer knowledge can be derived from 1) Hagler's testimony that Henry Finneguerra told his wife on February 28, 1975 that authorization cards must be signed, and 2) Hagler's admitted presence on March 3, 1975 when Finneguerra supposedly told Cleary to "sign the papers". Yet close examination of these portions of the record demonstrate that they do not necessarily prove what the Board says they do. Hagler's testimony involved hearsay from Henry Finneguerra to him (A. 670). Hagler may well have misunderstood what Finneguerra meant when the latter said he needed signed authorization cards. This does not mean that Finneguerra would seek to discharge the employees if they merely paid dues instead. Moreover, a motion to strike Hagler's hearsay response was granted by the Administrative Law Judge. As to the second instance, the record is void as to what

the "piece of paper" which Henry Finneguerra allegedly asked Cleary to sign contained (A. 418). Indeed just because Hagler was present does not mean that he understood or should have understood that Finneguerra was conditioning employment on Cleary's membership in the union.

These distinctions between the manner in which the employers in the respective cases gained knowledge of the unlawful demand are critical. In ZOE there can be little doubt that the employer was aware or should have been aware of the unlawful condition. In Gloria's Manor, the lack of employee communication on the subject and the questionable manner in which the employer supposedly gained the knowledge lead to two inescapable conclusions: one, that the employer may never really have been aware of the unlawful demand or condition, and two, the employees never really considered the condition as being a factor in their decision not to pay dues or have anything further to do with Local 4. Clearly, the reasonable grounds to believe was much stronger in ZOE than in Gloria's Manor. Yet, the Second Circuit reached the opposite conclusion in the former case.

The reason for the Second Circuit decision in favor of ZOE, despite the stronger proof of "reasonable grounds to believe", represents the cornerstone of that decision. It unequivicably demonstrates that employer awareness of an unlawful union condition is inconsequential where conflicting proof exists tending to show that the employees decision was instead based on hostility to the incumbent union and a commitment not to pay

under any circumstances or to have anything further to do with that union. The facts upon which the ZOE court based its reversal were described as follows:

> "When Local 803 requested the discharge of the non-joining employees in its letter of July 24, not only did the employees in question thereafter fail to protest a membership card requirement to the company, but the hearing examiner found they wanted nothing to do with the contracting union and demonstrated that they were entirely unwilling to become members on any basis whatsoever. The fact that neither the employees nor Local 149 made any attempt to participate in the arbitration proceeding from August 5 to 26, though on full notice of it could reasonably have suggested to ZOE that they still refused to have anything to do with Local 803 including most obviously the payment of dues."

Applying this critical rule of law developed in ZOE to the facts in the case at bar, it becomes clear once and for all that no reasonable grounds existed for Hagler to believe that the discharge request was based on factors other than the failure of the employees to pay dues. Whereas, the facts of Gloria's Manor are weaker in terms of proof of an unlawful demand and communication thereof, they are much stronger (than ZOE) in terms of employee animosity to Local 4 and unwillingness to cooperate with that union under any circumstances. The facts are uncontroverted that the employees wanted nothing to do with the incumbent union and were unwilling to pay dues or make arragements for the later payment of initiation fees on any basis whatsoever. This conclusion was borne out not only by the testimony of respondent's witnesses, but by witnesses on both sides of the dispute. These included the five discharged employees,

Hagler, and Vincent Gulino and Henry Finneguerra from Local 4. They conclusively demonstrated that irrelevant of whether Local 4 attached an illegal demand or not, the employees had long since made up their minds to have nothing further to do with that union.

When Henry Finneguerra first requested of Abernathy in late February that she pay her dues, he was greeted with an abusive and contemptuous reply. She demanded to know what she would receive for the money. Then, apparently answering her own question she walked away making it clear that she was not about to honor her dues paying obligation to that union (A. 296). Sullivan quite simply laughed at Henry Finneguerra when he made his request of her (A. 555). Curry, perhaps best demonstrated the employees' unwillingness to pay dues irrelevant of any union demands or conditions when she testified that although she had the letter requesting discharge in her hand, she declined to read it saying she wasn't interested (A. 391). She then stated that no one offered to pay dues to Local 4 after the dues money had been refunded by Gloria's Manor despite the numerous union requests (A. 391).

This growing hostility to Local 4 and the commitment not to have anything to do with that union under any circumstances was not lost on Hagler either. He related that on February 18, 1975 he pleaded with the employees, including the discharged five, to straighten out their union problems because he did not want to be in a position where he would have to discharge

them. The employees responded by telling Hagler "we will do what we want" (A. 698). Finally on February 28, 1975, Hagler after receiving the union written request and being advised by his attorney that he would have to honor it, called the five people into his office and pleaded once again for them not to place him in a position where he would have to discharge them. They contemptuously replied "we know what we have to do, we are big boys and girls, we will do what we want, what we have to do" (A. 700).

Local 4 representatives also corroborated this employee decision not to pay dues because of hostility. Vincent Gulino stated that as early as late January 1975, he came to Gloria's Manor to speak with the uncommitted employees to try to get them to either pay their dues or sign dues check-off cards. The employees advised that they would first talk with Curry. Gulino replied that if they didn't make suitable arrangements by February 10, 1975 they would have to be discharged under the terms of the collective bargaining agreement. Curry replied, in front of the other four employees: "Get away from me - where have you been for five weeks - don't talk to me - I don't want no part of you - I'm not going to pay the dues." The employees then shouted "Yes, we are with you". (A. 710-723).

Henry Finneguerra met with the same types of results. Cleary told him in February: "I don't want any part of it, I don't want to talk to you or discuss it"(A. 728). Either Sullivan or Gruenke told him "I don't want to pay the dues and

I don't want any part of it" (A. 728). Henry Finneguerra further related that on February 28, the employees refused to talk to him and just walked away (A. 730). On March 3, the date of discharge, the employees told Finneguerra that they didn't want to pay any dues, and didn't want any part of the union (A. 729).

Such testimony makes it abundently clear that employee animus to Local 4, of major proportions, existed and was the reason for their failure to pay the required dues. They had made a commitment to have nothing further to do with Local 4 under any circumstances, irrelevant of whether the dues prerequisite was tied to an unlawful demand or not. This explains why the employees never voluntarily offered the dues and never communicated the existence of an unlawful union demand to the employer. More importantly, the employees' position was glaringly communicated to the employer who, together with the other facts set forth above concerning the questionable nature of the so-called unlawful demand,was more than justified in concluding that the union request for discharge was not based on factors other than the failure to pay dues.

A final similarity also exists between the cases concerning employer conduct after being advised of the union request to discharge. Although Gloria's Manor initial refusal to honor the union request may not have been as strong as ZOE'S, it clearly did not demonstrate "prompt and unquestioning acquiesence by the employer in discharging an employee towards whom the union is hostile or arbitrary" condemned by the court in the

latter decision. Although, Finneguerra demanded the employees' discharge on February 28, the employer refused to do so and, instead demanded that the union serve them with a written request. Moreover, Hagler advised the union that he would first have to consult with his attorney before deciding whether to honor the union's request. In addition thereto, he repeatedly advised the employees that he liked their work and urged them to straighten out their problems. Rather than meekly submitting to the union, as the Board suggested, Hagler attempted to help the employees resolve their problems and only discharged them when it was clear that they would not pay the dues under any circumstances.* It was only with reluctance, after being repeatedly advised by the employees that they would not pay dues or cooperate with Local 4 in any way that the employer discharged them on March 3 and 5. (A. 700).

The real importance and approach of the ZOE decision is clear then. It is neither unlawful union demands, employer impartiality nor favoratism toward the existing union which are the critical and dispositive factors in determining whether reasonable grounds existed. Just because an employer may prefer a particular union does not necessarily mean that it will meekly follow that union's orders or will discharge employees when it knows that the real reason (as opposed to illusory reason) was an unlawful union demand. Such inferences, without more proof, are clearly not grounded in strong probability. More importantly, the inferences become totally irrelevant when considered against

* Indeed Hagler's commitment not to see his employees discharged was so strong that he offered to loan them the dues or fee monies owed. Clearly, the offer was made because it was Hagler's sincere belief that it was the failure to pay dues which was at the heart of the union's request to discharge.

the strong conflicting proof of employer awareness and reliance upon the fact that the employees demonstrated their unwillingness to cooperate with the incumbent union or pay dues under any circumstances. It is the presence of conflicting proof of animosity and the reasonableness of the employer reliance thereon which are the dispositive factors affecting the employer and not the mere existence of an unlawful union demand.

It would be totally improper for employees who have voiced their disregard for their legal obligation to avoid their responsibility of paying dues simply by pointing to an alleged improper union demand which had little relevance to their own decision. It must be remembered that Local 4 was the lawful representative of the employees at the time and that the employees had a legal obligation to pay their dues and fees. To allow these employees to intentionally abandon their own legal obligation and then, despite their own wrongdoing, permit them to point their finger at someone else in an attempt to "cover up" their own improprieties is contrary to the principles of the National Labor Relations Act. It is well settled that one cannot come into a court of law seeking relief when he himself is guilty of "unclean hands". More importantly, whether the union engaged in any impropriety or not, is of little relevance to the employer's conduct where, as here, he was aware of the employees wrongful position (not to pay dues under any circumstances) and relied on that "real reason" in deciding to discharge the employees at the union's request.

Therefore, given the substantial corroborated and uncontroverted evidence of employee hostility to Local 4 and commitment not to pay dues under any circumstances, the employer awareness and reliance thereon and the questionable proof concerning an unlawful union demand and the communication thereof to the employer, there can be little doubt that, under the law of ZOE the employer did not violate Sections 8(a)(3) of the Act by discharging the employees. The Board's position that reasonable grounds existed for believing that the employees were discharged for reasons other than their failure to pay uniformly required dues and initiation fees is clearly not supported by the substantive credible evidence on the record as a whole.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's Order should not be enforced and the Complaint dismissed.

Respectfully submitted.

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